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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GARY MELNIK,

Plaintiff and Appellant,

v.

JB OXFORD & COMPANY, INC.,

Defendant and Respondent.

B152347

(Los Angeles County
Super. Ct. No. SC059666)

Petition for Writ of Mandate.^{*} Stanley M. Weisberg, Judge. Denied. .
Law Offices of R. J. Redlich, Jr., and Julia A. Redlich for Plaintiff and Appellant.
Jones, Day, Reavis & Pogue and Allison R. Michael for Defendant and
Respondent.

Plaintiff Gary Melnik (“plaintiff”) appeals from an order that denied his motion for reconsideration of a petition to compel arbitration. The petition was filed by plaintiff’s former employer, defendant JB Oxford & Company (“defendant”). The order

^{*} The order from which plaintiff has appealed is nonappealable. We have chosen to treat the appeal as a petition for a writ of mandate.

denying reconsideration was made on the basis that plaintiff delayed for six months in bringing his motion for reconsideration and when he did bring it, he purposefully made it to the wrong judge.

Appellate review of an order denying a motion for reconsideration is made under an abuse of discretion standard.

However, the order from which plaintiff appealed is not a final order. Rather, the order states that the case was dismissed but the court would “retain[] residual jurisdiction to enforce the terms of the arbitration agreement and arbitrat[ion] award.” Other courts have described this as abating the action and retaining “vestigial” jurisdiction over the case. (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 487.) Whatever the description, the effect is that there is no final order from which an appeal may be taken.

In *Titan/Value Equities Group, Inc. v. Superior Court*, *supra*, 29 Cal.App.4th 482, the petitioners sought writ review of certain actions the trial court took after the case had been submitted to arbitration. We have chosen to treat this appeal as a petition for a writ of mandate, and because we find the trial court did not abuse its discretion when it denied reconsideration, we deny such mandamus relief.

BACKGROUND OF THE CASE

1. Plaintiff's Employment With Defendant

Defendant is a securities brokerage firm. Plaintiff began working for defendant on April 27, 1998. When he commenced this employment, plaintiff signed two documents that contain arbitration clauses.

Plaintiff was fired on December 7, 1998. On December 6, 1999, he filed this action against defendant, and on January 20, 2000, he filed a first amended complaint. He alleged a violation of California's Fair Employment and Housing Act, wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress.

2. Defendant's Petition to Compel Arbitration

Defendant asked plaintiff to either submit his claims to arbitration or provide authority for his not doing so. Not being satisfied with plaintiff's response, on February 22, 2000, defendant filed a petition to compel arbitration and a motion to stay plaintiff's suit pending completion of the arbitration.

The petition and motion were set to be heard on April 11, 2000 in department WEB. On that day, the judge sitting in that department, Judge Patricia Collins, recused herself, and the case was transferred to Judge Julius Title in department WEI for hearing on May 2, 2000.

When the parties appeared on May 2, plaintiff informed the court that the California Supreme Court had previously granted review in an arbitration case that concerns issues raised by plaintiff in the instant case about the enforceability of the arbitration clauses in the documents that plaintiff signed. The case is *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. (It was decided in late August 2000.) Plaintiff argued that many California court of appeal cases support his position that the instant arbitration clauses are not enforceable. The trial court was not persuaded. It granted the petition to compel arbitration. The court also ruled that a status

conference previously set for August 2, 2000 would remain for the purpose of monitoring the progress of the arbitration. Plaintiff's attorney asked for a minute order and the court replied "There will be a minute order."

Two months after the trial court ruled on defendants' petition to compel, plaintiff sent defendant a letter stating that as soon as the Supreme Court issued an opinion in the *Armendariz* case, plaintiff would file a petition for a "writ of prohibition/mandate in the Court of Appeals [sic]."

3. *The February 21, 2001 Status Conference*

The appellate record discloses that the status conference set for August 2, 2000 never took place. First; it was continued to January 2001. Then on January 18, 2001, Judge Alan Haber issued a "recusal re-assignment," reassigning the case from Judge Collins to Judge Stanley Weisberg for all purposes. Judge Weisberg set a status conference for February 21, 2001.

On February 21, plaintiff asked the court for declaratory relief on the issue whether this case should be arbitrated, given the Supreme Court's analysis in *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83. Plaintiff stated that the Supreme Court "made certain provisions in our arbitration agreement unlawful." The court observed that plaintiff had waited to that very day to file his written request for such declaratory relief, and defendant indicated it had not yet seen such request. Plaintiff stated he did not file it prior to the status conference because he "didn't want to waste the court's time with a formal motion as to the timeliness aspect of it." Later, plaintiff

reiterated he didn't want to waste the court's time "given the timeness [sic] of it"; the court replied that plaintiff was "wasting a lot of my time right now."

The court indicated plaintiff should present his request for declaratory relief by means of a noticed motion. Additionally, the court observed that the May 2, 2000 minute order on defendant's petition to compel arbitration did not direct either party to prepare an attorney order for the court to sign, and the court directed defendant to prepare an order within five days that reflects the May 2 decision to order the case to arbitration and "incorporated in that order shall be direction that . . . the matter be dismissed with the court retaining jurisdiction to enforce the terms of the arbitration agreement and the judgment."

The court continued the case to April 3, 2001, for a further status conference, saying that would give plaintiff an opportunity to move for reconsideration of the petition to compel arbitration, and if the order of dismissal was signed by then, plaintiff could also move to set aside the dismissal. Defendant submitted a proposed order on February 26, to which plaintiff filed objections. It was never signed.

On February 27, 2001, plaintiff filed papers entitled "plaintiff's supplemental memorandum in opposition to defendant's petition to compel arbitration and motion for order staying civil action." Defendant filed a response in which it argued that plaintiff could not logically present supplemental opposition to defendant's petition to compel arbitration since that petition had already been granted, and if plaintiff wanted relief from the order granting the petition to compel arbitration, plaintiff should file an actual motion for such relief. In his reply papers, plaintiff argued that defendant's petition was never

actually granted because “to date, no written order has been entered [and] at no time did Judge Title indicate that a minute order would be the ‘order of the Court.’ ”

4. The April 3, 2001 Further Status Conference

At the April 3, 2001 further status conference, the court indicated that except for defendant’s proposed order, its file did not contain the papers the parties had filed since the last hearing. The court rescheduled the hearing to May 15, 2001. Thereafter, plaintiff filed a motion for reconsideration of defendant’s motion to compel arbitration, and the parties refiled the papers they had previously filed for the April 3 hearing, as well as additional points and authorities.

In the meantime, the case was transferred to another judge, who on May 15, ordered that plaintiff’s pending motion would be rescheduled for May 17 in front of Judge Weisberg.

5. The May 17, 2001 Hearing

At the May 17, 2001 hearing on plaintiff’s motion for reconsideration, the court asked plaintiff why he waited to six months after the *Armendariz* decision to challenge the court’s ruling on defendant’s petition to compel arbitration. Plaintiff answered it was because (1) there was no “written order” on the petition to compel arbitration, and (2) he was waiting for the case to be assigned to a judge for individual calendaring. Regarding the first excuse, the court observed that since the minute order on defendant’s petition to compel arbitration did not direct that an attorney order be prepared, the minute order was sufficient for purposes of bringing a motion for reconsideration, and it did not need to be signed by Judge Title since it was not an order of dismissal (Code Civ. Proc., § 581d).

Regarding plaintiff's second excuse, the court pointed out that (a) the case was reassigned effective October 3, 2000, but it was not until late February 2001 that plaintiff indicated he wanted relief from the order granting the petition to compel arbitration, (b) the motion for reconsideration could have been brought in August or September after *Armendariz* was decided and prior to reassignment, and (c) the judge who ruled on the motion to compel arbitration (Judge Title) was the judge to whom the motion for reconsideration should have been brought, and Judge Title had been available "throughout all this time."¹ Plaintiff responded he was "looking for a new judge [because] he did not feel [he] would get accurately heard before Judge Title"; nevertheless, he asked the court to transfer the matter to Judge Title.

The court declined to transfer the matter, saying the case had been in the court long enough. The court denied the motion for reconsideration on two grounds—plaintiff's delay in moving for relief "was unreasonable and unjustified," and plaintiff failed to bring his motion before Judge Title.

On May 30, 2001, the court signed and filed an order by which it dismissed the case but retained residual jurisdiction to enforce the terms of the arbitration agreement and the arbitration award. Thereafter, plaintiff filed this appeal.

¹ An order made by one judge ordinarily is not reconsidered by another judge of the same court, however the unavailability of the first judge will authorize another judge to reconsider the order. (*International Ins. Co. v. Superior Court* (1998) 62 Cal. App.4th 784, 786, fn. 2.)

CONTENTIONS ON APPEAL

“In California the issue of the validity of an arbitration agreement ‘is determined upon a petition to compel arbitration.’ [Citation.]” (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670.) After the *Armendariz* case was decided, plaintiff believed that the trial court should take another look at defendant’s petition to compel arbitration, so as to determine its merit based on the holdings in *Armendariz*. When the trial court refused to do so, plaintiff filed this appeal, asking us to take that look. He contends that under *Armendariz*, the arbitration provisions in the employment documents he signed are unenforceable. For reasons explained below, we also decline to examine the substantive merits of plaintiff’s motion for reconsideration.²

DISCUSSION

By bringing a petition to compel arbitration and a motion to stay litigation, a defendant asks the court to compel the plaintiff to arbitrate his claims rather than litigate them. (Thereafter, whether the plaintiff chooses to arbitrate or to simply let his claims become stale is a matter of his own choosing. He is not actually compelled to pursue

² Plaintiff errs when he asserts that Judge Weisberg *actually considered* the impact of *Armendariz* on the instant arbitration clauses but then “disregard[ed] the fact that [defendant’s] Arbitration Agreement was unconscionable and unenforceable under the current law.” The record does not indicate that Judge Weisberg considered the substantive merits of plaintiff’s motion. It indicates just the opposite. Judge Weisberg ruled he would *not* reconsider defendant’s petition to compel arbitration.

To reconsider a motion or petition is to take another look at it and then either change the ruling on it or let the ruling stand. Here, Judge Weisberg declined to review the question whether the subject arbitration agreements are enforceable. He stated: “It seems to me too much time has passed to have this matter be the subject of any further consideration.”

them.) When the plaintiff in the instant case asked the court to reconsider defendant's motion to compel arbitration, plaintiff was asking the court to reassess whether he should have to arbitrate his claims rather than litigate them.

Code of Civil Procedure section 1008, subdivision (c) permits, but does not require, a court to reconsider its prior orders based on a change in the law. It states: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order."

We review the trial court's denial of plaintiff's motion for reconsideration under an abuse of discretion standard. (*Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.* (2001) 85 Cal.App.4th 1300, 1318.) We look to see if the trial court exceeded the bounds of reason, based on the circumstances before it. Absent a showing of injustice and a clear case of abuse, we will not reverse the court's decision, even if we would have rendered a different one. (*Ibid.*) Here, we find no cause to reverse.

1. *There Was No Need for a "Written Order" Compelling Plaintiff to Arbitrate*

On appeal, plaintiff asserts that although the May 2, 2000 minute order "accurately reflect[s]" Judge Title's "oral ruling granting Defendant's Petition," "Judge Title did not make an oral order on the record, or an order of any kind," nor did Judge Title "indicate that a minute order would be the 'order of the Court.'" Plaintiff appears to assert that since he moved for reconsideration *prior* to entry of a "written order" on the motion to compel arbitration, there was no basis for a finding that he lacked due diligence. We

cannot agree. Plaintiff cites no authority, and we know of none, that holds that a minute order granting a motion to compel arbitration is not sufficient to require the plaintiff to arbitrate his claims. If the trial court wanted an attorney order prepared for the motion to compel arbitration, it would have directed its preparation. Moreover, if plaintiff really believed an attorney order was needed, he could have submitted one himself and thereby avoided a lengthy delay and the appearance of a lack of due diligence.

*2. The Court Was Not Required to Reconsider the Order
Compelling Arbitration*

Reversal of the court's order denying reconsideration is not required by the mere fact that (1) section 1008 permits a trial court to reconsider a prior order "at any time" if there has been a change in the law and (2) courts possess inherent power to reevaluate and amend their interim rulings. Neither of these sources of power *require* a court to ignore the factual parameters of a case, including the timing of a request for reconsideration.

In *Blake v. Ecker* (2001) 93 Cal.App.4th 728, we required the trial court to reconsider and decide defendant's motion to compel. We did not, however, mandate how the court should rule on the motion. In *Blake*, there was a three-month lapse between the filing of the *Armendariz* decision and the plaintiff's motion to reconsider a petition to compel arbitration (which the plaintiff denominated a motion to vacate the order compelling arbitration). The plaintiff's motion was based on the then-recent decision in *Armendariz*, and was brought as a partial response to the defendants' motion to dismiss the suit for failure of the plaintiff to timely pursue arbitration after the petition to compel

arbitration had been granted. The trial court granted the motion to dismiss and on that basis, ruled the plaintiff's motion to vacate was moot. Therefore, it never even reached the plaintiff's motion or its merits.

On appeal, we ruled that the trial court had lacked jurisdiction to consider the motion to dismiss and therefore, the plaintiff's motion to vacate was back on the table. (*Id.* at pp. 737-738.) We held that the trial court "was bound to grant such reconsideration in light of the conflict among prior authorities that was resolved by *Armendariz*." (*Id.* at p. 739.) That holding is not at odds with our finding in this case that there was no abuse of discretion when the trial court did not grant plaintiff's motion for reconsideration. Unlike in *Blake*, plaintiff's motion *was* heard, albeit denied. In addition, this case is factually different from *Blake* in that it involves (1) judge shopping and (2) a contention by the defendant that reconsideration should be denied because the plaintiff delayed in bringing his motion. In *Blake*, only three months had passed between the rendering of the *Armendariz* decision and the plaintiff's request for reconsideration, and there was no contention by the defendant that plaintiff should have brought her motion sooner. Here, by the time plaintiff had actually timely served notice of a hearing on his request for relief, six months had passed, even though plaintiff had been fully aware for many months that *Armendariz* was pending in the Supreme Court and that it involved issues similar to those raised by plaintiff with respect to the arbitration agreements he signed.

Given plaintiff's unjustified lengthy delay in seeking reconsideration of defendant's petition to compel arbitration, and his purposeful judge shopping, we cannot

say the trial court abused its discretion when it declined to reconsider defendant's petition. Because we affirm this case on this procedural ground, we need not, and do not, reach the merits of defendant's contention that under the doctrine of federal preemption, *Circuit City v. Adams* (2001) 532 U.S. 105 [149 L.Ed.2d 234, 121 S.Ct. 1302] and other federal case and statutory law limit the application of *Armendariz* to this case.

DISPOSITION

Treating this appeal as a petition for a writ of mandate as we do, the petition is denied. The defendant shall recover its costs incurred in these review proceedings.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.